Supreme Court, U.S.
FILED
NOV 16 2007
OFFICE OF THE CLERK

No. 07-889

IN THE
Supreme Court of the United States

GLORIA PERSICHILLI,

Petitioner,

vs.

MICHAEL J. ASTRUE,
COMMISSIONER OF SOCIAL SECURITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

GARY PALMER, ESQ.
GARY DAVID PALMER, P.A.
17971 Biscayne Boulevard
Suite 216
Aventura, Florida 33160
Telephone: (305) 931-8000
Fax: (305) 933-3675

QUESTION(S) PRESENTED

1. Does the Due Process Clause require the Federal Appellate Court to examine all previous United States District Court suits, in pari materia, with the one on appeal before it, filed by the Petitioner involving the same claim for Social Security Disability benefits, before it applies issue raising to deny consideration of Petitioner's argument?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Michael J. Astrue, Appellee

2. R. Alexander Acosta, United States Attorney

3. Anne R. Shultz, Chief, Appellate Division, United States Attorney

4. Frank V. Smith, Chief Counsel, Region VII

5. Kristin L. Everhart, Assistant United States Attorney

6. Beth Jarrett, Assistant United States Attorney

7. Adalberto Jordan, United State District Judge

8. Wiliam J. Zloch, United States District Judge

9. Robert L. Dube', United States Magistrate Judge

10. Barry S. Seltzer, United States Magistrate Judge

11. Gloria Persichilli, Plaintiff-Appellant

12. Irwin Bernstein, Administrative Law Judge

13. Ruben Rivera, Administrative Law Judge

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States Court of Appeals for the Eleventh Circuit Case No. 07-0714 appears at Appendix 1a to the petition and is unpublished.

The opinion of the United States District Court for the Southern District of Florida Case No. 00-6044 appears at Appendix 30a to the petition and is unpublished.

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was August 21, 2007.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE

42 U.S.C. § 1383 (c) (3)

The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title.

JUDGMENTS ENTERED BY THE COURTS BELOW

United States Court of Appeals for the Eleventh Circuit No.: 07-10714.

United States District Court for the Southern District of Florida D.C. No. 05-61124

United States District Court for the Southern District of Florida D. C. No.00-6044

STATEMENT OF THE CASE

Petitioner filed a claim for Social Security Disability benefits and on July 24, 1996, an Administrative Law Judge (ALJ) issued an unfavorable decision. On October 31, 1997, the Appeals Council of the Social Security Administration remanded the case. On March 13, 1998, following a supplemental hearing an ALJ issued an unfavorable decision. After the Appeals Council denied Petitioner's request for review, Petitioner pursuant to 42 U.S.C. § 1383 (c) (3) filed an appeal to the United States District Court. D.C. No. 00-6044-civ-Zloch/Seltzer.

In her appeal, Petitioner raised and argued the issue that the ALJ failed to adequately evaluate the medical evidence, thereby resulting in an incorrect residual functional capacity assessment. Petitioner's brief contained specific references to the issue that the ALJ did not acknowledge her severe manipulative limitations which affected her bilateral manual dexterity, rendering her incapable of performing a full range of sedentary work.

The United States Magistrate recommended that the decision of the ALJ be affirmed. The United States District Court refused to adopt the Report and Recommendation of the United States Magistrate, and remanded the case for a new hearing and additional medical evidence. A new hearing resulted in a third ALJ denial decision on November 22, 2002, adopting the rationale set forth in the report and recommendation of the United

States Magistrate and finding that the Plaintiff retained the residual functional capacity to perform a full range of sedentary work.

Petitioner pursuant to 42 U.S.C. § 1383 (c)(3) filed an appeal to the United States District Court. D.C. No. 05-61124-civ-Jordan/Dube'.

In her memorandum in support of her motion for summary judgment and response to defendant's motion for summary judgment, petitioner argued that the Commissioner erred in adopting the rationale set forth in the report and recommendation of the United States Magistrate. Petitioner asked the Court to draw the conclusion that the United States District Judge below, wanted to afford both parties an opportunity to present medical evidence as to whether the Petitioner's physical and mental disabilities continued to remain severe in it's effect on her ability to perform substantial gainful activity beyond the date of her last insured status.

The United States Magistrate issued a memorandum order and final judgment on December 13, 2006 denying Petitioner's motion for summary judgment and affirming the decision of the Commissioner in favor of the Defendant.

Petitioner pursuant to 42 U.S.C. § 1383 (c) (3) filed an appeal to the United States Court of Appeals for the Eleventh Circuit, Appeal No. 07-10714 .

Petitioner, in its' initial brief posited the argument to the United States Court of Appeals for

the Eleventh Circuit that the Commissioner's finding that Petitioner could perform a full range of sedentary work was not supported by substantial evidence.

The reason being that the Commissioner failed to consider Social Security's definition of sedentary work as further defined in the Social Security Rulings (SSR).

Since the Commissioner failed to address Petitioner's severe manipulative impairments on erosion of her occupational base for sedentary work, his finding that she retained the capacity to perform a full range of sedentary work was not supported by substantial evidence.

The Eleventh Circuit Court of Appeals' decision in Persichilli, after reviewing the history of the case including both suits filed in the United States District Court for the Southern District of Florida stated that:

> "In her appeal, Persichilli argues that the ALJ's finding that she can perform a full range of sedentary work was not supported by substantial evidence because the ALJ did not acknowledge her severe manipulative limitations which affected her bilateral manual dexterity. Second, she argues that the ALJ erred in relying on the medical vocational guidelines to direct a finding that Appellant was not disabled because she had a nonexertional impairment that significantly

limits her manipulative abilities to perform basic work skills. Third, Persichilli argues that the ALJ should have performed a detailed analysis, via both the medical vocational guidelines and the vocational expert, regarding the affect her bilateral manipulative limitations had on her ability to perform sedentary work. Finally, she argues that testimony from a vocational expert was required to demonstrate that there were other jobs in the national economy that Persichilli could have performed with a residual functional capacity for less than a full range of sedentary work. As a general rule however, this Court will not address an argument that has not been raised in the District Court.

After review of the Record, we conclude that Persichilli has waived her appellate arguments by failing to raise them in the District Court.

Rather, Persichilli focused on depression, the ALJ's rejection of Dr. Seidman's opinion, and the ALJ's alleged circumvention of the District Court remand order. Accordingly, we decline to consider these issues raised for the first time on appeal, and affirm the decision of the District Court."

REASONS FOR GRANTING THE WRIT

The issue raising requirement as currently practiced by the Federal Court of Appeals is inappropriate in Social Security Disability cases where often multiple appeals to the United States District Court are required to challenge different grounds for denial of benefits presented by the Social Security Administration.

Basic principles of equity and due process direct the conclusion that issue raising to bar consideration of a Petitioner's arguments should not be applied in the Social Security Disability context if the issue had previously been raised by the same Petitioner in an earlier United States District Court suit involving the same case and the same period of time. In such a case, there is no need to protect the Social Security Administration from unfair surprise from new issues asserted on judicial review.

Thus, there is no possibility of prejudice or unfairness to opposing counsel from having to alter positions or introduce new evidence to respond to "surprise" issues raised by the Petitioner.

The Social Security Administration holds out the promise of informality and non-adversarial assistance on administrative review. However, claimants are then penalized on judicial review when the Social Security Administration turns around and seeks dismissals of issues which have not been raised in the last of a sequence of United States District Court proceedings involving the same

Petitioner, the same case and the same period of time. It is against equity and good conscience for the Social Security Administration to argue that Petitioner's appeal should be dismissed because the issue raised in the first United States District Court suit was not specifically before the United States Court of Appeals considering the most recent United States District Court suit and therefore the issue should be considered waived and not preserved. To characterize Petitioner's failure to raise an issue again on a second suit in the United States District Court involving the same claim, and the same period of time, as a waiver, violates basic equitable principles and established procedural due process norms that a waiver is an intentional relinquishment or abandonment of a known right. Sims v. Apfel, 530 U.S. 103, 120 S.Ct. 2080, 147 L.Ed.2d 80 (2000).

Manifest injustice would result from the United States Court of Appeals' refusal to consider this Petitioner's issue on judicial review, by limiting their attention only to Petitioner's second United States District Court suit. Hormel v. Helvering, 312U.S. 552,85L.Ed.1037,61S.Ct.719(1941).

The Supreme Court ordinarily does not decide questions not raised or resolved in the lower Court. The Courts of Appeal have followed the Supreme Court's lead and have held that Appellate Courts should not ordinarily consider issues and arguments that have not been properly raised or preserved in the trial Courts, (emphasis provided). However, in an appeal of a Social Security Administration's

denial of benefits, issues raised and argued in the first of several United States District Court suits should be considered preserved until all United States District Court suits related to that Petitioner's claim are exhausted on appeal. A Social Security Disability Plaintiff's cause of action for judicial review is a species of property protected by the Due Process Clause. Logan v. Zimmerman Brush Company, 455U.S.422,428-29(1985).

> "In Logan, the Court noted that it had traditionally held the Due Process Clause protects civil litigants in the Courts including Plaintiff seeking to address grievances. 455U.S.429, and it has read the property component of the 5th Amendment's Due Process Clause to impose constitutional limitations upon the power of Courts, even in the aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

There is no question that denial of benefits causes extreme hardship to the poor and disabled. Many disabled persons are forced to subsist on state public assistance programs. Others are left with no means of subsistence at all. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v. Manzo 380U.S.545, 552 (1965). The Social Security Act was designed by Congress to be unusually protectively of claimants. Bowen v. City of New York, 476U.S. 480(quoting

Heckler v. Day 467U.S.104,106(1984). The Social Security Act relies upon the courts to remedy erroneous denials of benefits by the Commissioner. Meritorious issues should be heard by the courts to prevent the tragedy of a wrongful denial of the necessities of life to disabled people. Principles of equity and due process direct the conclusion that a Federal Appellate Court should not apply issue raising in the Social Security Disability context to deny consideration of Petitioner's argument, until it has examined issues raised in all previous United States District Court suits, in pari materia, involving the same Petitioner, the same case and the same period of time as the one on appeal before it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
s/Gary Palmer

GARY PALMER, Esq.
Gary David Palmer, P.A.
17971 Biscayne Boulevard, 216
Aventura, Florida 33160

APPENDIX

UNITED STATES COURTS OF APPEAL
For the Eleventh Circuit

No. 07-10714

District Court Docket No.
05-61124-CV-AJ

GLORIA PERSICHILLI

Plaintiff-Appellant,

versus

COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION,
Michael J. Astrue,

Defendant-Appellee.

Appeal from the United States District Court
For the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: August 21, 2007
For the Court: Thomas K. Kahn, Clerk
By: Jackson, Jarvis

(DO NOT PUBLISH)
IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-10714
Non-Argument Calender

D.C. Docket No. 05-61124-CV-AJ
GLORIA PERSICHILLI
Plaintiff-Appellant,
versus

COMMISSIONER OF SOCIAL SECURITY ADMINISTRATION
Michael J. Astrue,
Defendant-Appellee

Appeal from the United States District Court
For the Southern District of Florida

(August 21, 2007)
Before BIRCH, BLACK AND KRAVITCH, Circuit Judges.
PER CURIAM:

Appellant, Gloria Persichilli, appeals the district court's order affirming the denial of her application for disability insurance benefits, 42 U.S.C. § 405(g). For the reasons set for the below, we affirm the decision of the district court.

I.

On March 13, 1995, Persichilli applied for disability insurance benefits, alleging an onset date of December 20, 1994. She identified carpal tunnel syndrome and ulnar nerve entrapment as the conditions affecting her ability to work. Her application was denied both initially and on consideration. Persichilli requested a hearing before an Administrative Law Judge ("ALJ"), and, following the hearing, the ALJ issued a decision on July 23, 1996, denying the request for benefits. This denial was remanded by the Appeals Council with an order that the ALJ hear evidence from a vocational expert. Following a second hearing on February 25, 1998, in which two vocational experts testified, the ALJ again denied Persichilli's request for benefits. This decision was upheld by the Appeals Council.

On January 10, 2000, Persichilli filed a complaint in the United States District Court for the Southern District of Florida, and the magistrate judge recommended that the Commissioner's decision be affirmed. The district court, however, declined to affirm the recommendation and remanded the case back to the Commissioner with instructions to hold a consultative medical examination and receive expert medical evidence as to the nature of severity of Persichilli's current impairment. A third hearing was held and, once again, the ALJ denied the request for benefits. This decision was upheld by the Appeals Council.

Persichilli then filed a second suit in the district court. In this claim, Persichilli alleged that she had not worked since December 20, 1994, due to

bilateral carpal tunnel syndrome with ulnar nerve entrapment, chronic pain syndrome, and major depression. Persichilli then moved for summary judgment, alleging that the ALJ erred in (1) determining that her depression was not a severe impairment; (2) refusing to consider evidence of medical treatment by her psychologist after March 31, 2000, the last date of her insured status; and (3) adopting the finding and conclusions in the Magistrate Judge's order of November 3, 2000. The Commissioner also filed a motion for summary judgment. The Commissioner argued that (1) the record conflicted with the proposition that Persichilli's depression caused severe impairment and the ALJ properly discounted her treating psychologist's opinions because they conflicted with the record; (2) Persichilli's depression was not severe and could not be of listing level severity; (3) Persichilli provided no evidence regarding how evidence of treatment of depression after March 31, 2000, would change the ALJ's decision; and (4) the ALJ properly adopted the findings and conclusions of the Magistrate Judge.

The district court granted the Commissioner's motion for summary judgment, and affirmed the Commissioner's decision.

Persichilli now appeals. In her appeal, Persichilli argues that the ALJ's finding that she could perform a full range of sedentary work was not supported by substantial evidence because the ALJ did not acknowledge her "severe manipulative

limitations which affected her bilateral manual dexterity." Second, she argues that the ALJ erred in relying on the Medical Vocation Guidelines to direct a finding that the appellant was not disabled because she had "nonexertional impairments that significantly limited her manipulative abilities to perform basic work skills." Third, Persichilli argues that the ALJ should have performed a detailed analysis, via both the Medical Vocational Guidelines and a vocational expert, regarding the effect her bilateral manipulative limitations had on her ability to perform sedentary work. Finally, she argues that testimony from a vocational expert was required to demonstrate that there were other jobs in the national economy that Persichilli could have performed with her residual functional capacity for less than a full range of sedentary work.

II.

We review the Commissioner's decision in a social security case to determine if it is supported by substantial evidence and whether the correct legal standards were applied. Crawford v. Comm'r of Soc. Sec., 363 F .3d 1155,1158 (11th Cir. 2004). As a general rule, however, "this court will not address argument that has not been raised in the district court." Stewart v. Dep't of Health and Human Servs., 26 F.3rd 115,115 (11th Cir. 1994); see also Jones v. Apfel, 190 F.3d 1224, 1228 (11th Cir. 1999) (declining to consider an issue presented for the first time on appeal in a social security case).

III.

After a review of the record, we conclude that Persichilli has waived her appellate arguments by failing to raise them in the district court. In her appeal, Persichilli argues that the ALJ ignored her inability to perform a full range of sedentary work because of her nonexertional manipulative limitations and the impact of those limitations on her hands. This argument was not presented to the district court. Rather, Persichilli focused on her depression, the ALJ's rejection of Dr. Seidman's opinion, and the ALJ's alleged circumvention of the district court remand order.

Accordingly, we decline to consider these issues raised for the first time on appeal, and AFFIRM the decision of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-61124-JORDAN/DUBE'

CONSENT CASE

GLORIA PERSICHILLI,
Plaintiff,

v.

JO ANNE BARNHART,
Commissioner of Social Security,

Defendant.
_____/

MEMORANDUM ORDER AND FINAL JUDGMENT

THIS CAUSE is before this Court on the Motion for Summary Judgment filed by the Plaintiff (D.E. #8) and the Motion for Summary Judgment filed by the Defendant (D.E.#17) pursuant to the consent of the parties and an Order of Reference entered by the Honorable Adalberto Jordan, United States District Judge. The issue before this Court is whether the record contains substantial evidence to support the denial of benefits to Plaintiff Gloria Persichilli (hereinafter "Persichilli" or "Plaintiff").

I. FACTS

Persichilli filed an application for disability insurance benefits on March 13, 1995. (R. 113).[1] This application was denied initially and on reconsideration. (R. 127, 142). Following a hearing, the ALJ issued a decision on July 24, 1996 denying the request for benefits. (R. 305-324). A request for review filed with the Appeals Council was granted and the cause remanded for further consideration. (R. 332-334). Following the remand, the ALJ held another hearing and issued a decision denying the request for benefits. (R. 15-36). This determination was upheld by the Appeals Council. (R.5). The Plaintiff filed a complaint in the United States District Court for the Southern District of Florida on January 10, 2000. Ultimately, an Order was entered by Chief Judge Zloch remanding the case for further proceedings. (R. 425). A supplemental hearing was held on November 6, 2002. (R. 547-564). Following this hearing, the ALJ issued a decision once again denying the request for benefits. (R. 395-405). A request for review filed with the Appeals Council (R. 393) was denied. (R. 387).

As noted above, three hearings were held in this cause on June 16, 1996, February 25, 1998 and November 6, 2002. (R. 60-96, 97-112, 547-564).

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[1] All references are to the record of the administrative proceeding filed as part of the Defendant's answer.

During the first hearing, the Plaintiff testified that she stopped working in December 1994 due to pain and numbness in her arms and elbows. (R. 101). The Plaintiff also stated that she underwent unsuccessful surgery of her right hand for carpal tunnel syndrome in May 1994 and a second surgery in January 1995, which also failed to resolve the problem. (R. 101-102).

The Plaintiff also began to experience pain and numbness in her left hand and elbow and underwent surgery for the left hand in December 1995. According to the Plaintiff, this surgery did not relieve the pain. (R. 102-103). Persichilli also stated that the pain medication caused side effects, including stomach discomfort, drowsiness and irritability. (R. 103).

The Plaintiff testified that she was unable to hold anything in her hands without pain and that she was unable to wash dishes, open a jar, use a can opener, had difficulty getting dressed and did not engage in any sports, hobbies or social activities. The Plaintiff also stated that she was able to drive a car on occasion, but that it was painful. (R. 104-105).

Persichilli testified that she had previously worked as a dental hygienist, but that she could not return to that position since it required the use of her hands. (R. 105). The Plaintiff also stated that she was presently in college at Florida Atlantic University. According to the Plaintiff, she enrolled approximately one year earlier, but began her

studies about one month before the June 1996 hearing. (R. 108). The Plaintiff added that she was taking one course which met one hour per day for six weeks. (R. 109-110). The Plaintiff also stated that some days she drives the twenty minutes to the college, but that on other days her mother or a friend gives her a ride. (R. 110-111).

At the second hearing, held on February 25, 1998, the Plaintiff then age 42, testified that she was presently being treated for depression and bilateral carpal tunnel. (R. 63-64). The Plaintiff reported increased pain and no increase in strength since the first hearing in addition to pain in her shoulder. She also stated that she was able to hold a phone for only a short period of time, could not hold a book open to read, and could use writing instruments for no more than ten or fifteen minutes. (R. 64-65).

The Plaintiff testified that the side effects of her pain medication included confusion and stomach irritation. Persichilli described the pain as going from her elbow to the palm of her hand and that it also impacted her ability to sit and sleep. (R. 65-66).

The Plaintiff stated that her depression had not changed since the time of the first hearing, and that taking courses at college was suggested by her psychologist to get her out of the house. (R.69). She added that she was going to college hopefully have a new occupation, since she wanted to go back to work, but could not at the present time. (R. 70). The Plaintiff also testified about various accommodations provided by the school, including

the use of a note taker for classes. (R. 69-70).

Persichilli described her depression as causing her to cry, be unable to handle stress, not want to be around other persons and have problems with concentrating. (R. 75-76). The Plaintiff added that her inability to work was the result of the combined physical and emotional problems. (R. 76). Rebecca Brownell, a vocational expert, also testified at the hearing. Brownell classified the Plaintiff's prior work as a dental hygienist as light/skilled and requiring bilateral use of hands on a repetitive basis. (R. 85). The ALJ presented Brownell with a hypothetical in which the Plaintiff was limited to lifting five pounds frequently, ten pounds occasionally, sit for six hours per day, stand for two hours per day and not able to do any work which required repetitive use of hands. Based on this situation, Brownell testified that the Plaintiff could not return to her past work. (R. 86). However, the vocational expert identified the sedentary unskilled position of surveillance systems monitor which could be performed. (R. 87).

In a second hypothetical, the ALJ raised the lifting abilities to ten pounds frequently and twenty pounds occasionally, but kept the remaining restrictions. Brownell once again indicated that the Plaintiff could not perform her prior work under this hypothetical, but indicated that light demand positions such as toll collector and usher were available. (R. 87-88).

The final hypothetical provided by the ALJ asked the vocational expert to assume that the Plaintiff had the restrictions noted in the first two hypothetical situations, along with severe depression, an inability to concentrate, poor ability to deal with the public, supervisors or work stresses and poor ability to behave emotionally. Based on this scenario, Brownell stated that the Plaintiff would not able to perform any work at all. (R. 89).

Another vocational expert, George Panacci, was present at the hearing. Panacci agreed with the findings made by Brownell concerning the Plaintiff's inability to perform her past work under the first two scenarios provided by the ALJ and her inability to do any work under the final hypothetical. (R. 90-91). However, Panacci testified that the Plaintiff would not be able to perform the tasks of a surveillance systems monitor due to the requirements for gross movements in the handling and holding of a telephone. (R. 91). He also stated that the Plaintiff could not perform the job of toll collector if her testimony as to the degree of functional limitation in fine and gross motor movements was accepted. (R. 92). Additionally, Panacci pointed to difficulties which might be present due to various tasks required to be performed by an usher. (R. 92-94).

The Plaintiff also testified at the third and final hearing held in this case on November 6, 2002. Persichilli, then age 47, stated that she had a license to drive and had last driven to the store the day prior to the hearing. The Plaintiff added that she drove three to four trips per week. (R. 549-551).

The Plaintiff reported bilateral carpal tunnel, depression, migraine headaches and neck pain from a herniated disc. (R. 552-553). Persichilli testified that she could probably walk a couple of miles, stand for approximately an hour, sit for two hours and lift under ten pounds. She also stated that she could not move her fingers without pain, had no hobbies or social activities and was able to dress herself most of the time. (R. 554-555). The Plaintiff added that she did not do any housework. (R. 555). Persichilli stated that her activities were dependent on her pain and that sometimes she would watch television during the day and other times she would stay in bed. (R. 556).

The Plaintiff described her hand pain as sharp and coming unexpectedly. She also indicated that she had pain in the elbows and upper part of her arm which goes to her neck. (R. 556-557). The Plaintiff also reported symptoms from depression and the side effects of her medication. (R. 558-559). Persichilli testified that she had applied for many jobs, but had been turned down for the positions. (R. 560-562).

In addition to the testimony presented at the hearings, medical records were submitted to the ALJ. Notes from David Applebaum, M.D., indicate that the Plaintiff experienced problems with her right hand in early 1994, which was treated with steroid injections. Symptoms also appeared in the Plaintiff's left hand. An endoscopic release of carpal tunnel syndrome, right hand was performed by Dr. Applebaum on May 27, 1994.

Treatment notes following the surgery showed some improvement, but continued problems remained and further surgery was recommended. (R. 189-208).

The Plaintiff also underwent treatment at Hand Rehabilitation Specialists from June 1994 through November 1994. The notes from the facility indicate the presence of pain and the use of various treatments including ultrasound and massage. (R. 209-224).

A Progress Note prepared by Ephraim M. Zinberg, M.D., on November 10, 1994 indicates that the Plaintiff complained of increased pain, particularly at the ulnar aspect of the wrist and medial aspect of both elbows radiating to the fingers. (R. 225). The note lists an impression of persistent right carpal tunnel syndrome with persistent sensory loss in the thumb; Guyon's canal compression, bilateral and cubital tunnel syndrome, bilateral. Dr. Zinberg proposed a plan including the use of a thermoplastic brace which was to be worn for at least three weeks, during which time the Plaintiff would not be able to work. (R. 225).

Notes from Anne Ouellette, M.D., include the report of an examination performed on December 28, 1994, which indicated continued right carpal tunnel syndrome. The report recommended an open carpal tunnel release on the right. (R. 231). This procedure was performed on January 27, 1995. (R.229). Improvement was seen on February 8, 1995, but Dr. Ouellette stated that the pain would probably continue and the Plaintiff needed to

consider changing her job. (R. 228). On March 8, 1995, the Plaintiff continued to have pain, but was seen as doing quite well. Dr. Ouellette again indicated that the Plaintiff would need to change her job and could not continue as a dental hygienist. Left carpal tunnel syndrome was also noted, and a release was recommended. (R. 227). This procedure was performed on December 19, 1995. (R. 268-270).

In a statement dated March 27, 1996, Dr. Ouellete found that the severity of the Plaintiff's impairments met or equaled the level of severity for Listing 1.13. (R. 266). The notes of a visit on September 3, 1997 indicate that the Plaintiff had continued right arm pain. (R. 373). Dr. Ouellette completed a Medical Questionnaire on December 12, 1997, in which she found that the Plaintiff would be able to perform sedentary work, but no light or medium work. Dr. Ouellette added that while the Plaintiff would not be capable of returning to her prior work, she was to perform other types of work, specifically, anything that she would not do repeatedly. (R. 338).

The notes of a visit with Dr. Ouellette on February 7, 2001, state that the Plaintiff had continued numbness and tingling. (R. 481). Nerve conductions were seen as normal on February 20, 2002. (R. 478). Dr. Ouellette completed a form on April 18, 2002 finding that the Plaintiff's condition met or equaled the severity of Listing 1.08 from January 17, 1995 to the present. (R. 476). Additionally, the doctor found that the Plaintiff's impairments caused her functional loss since

January 17, 1995 and involved one major peripheral joint in each upper extremity resulting in her inability to perform fine and gross movements effectively. (R. 477).

A Psychiatric Review Technique, dated April 10, 1995, found the presence of a non-severe affective disorder. (R. 248-251). According to the report, the Plaintiff had no restrictions of activities of daily living; slight difficulties in maintaining social functioning; seldom had deficiencies of concentration, persistence or pace and had no episodes of deterioration or decompensation. (R. 255).

Another Psychiatric Review Technique, prepared on July 25, 1995, found the presence of non-severe affective and anxiety related disorders. (R. 257, 260, 261). The report also found that the Plaintiff had slight restrictions of activities of daily living and in maintaining social functioning; seldom and deficiencies of concentration, persistence or pace and had no episodes of determination or decompensation. (R. 264).

On October 7, 1997, the Plaintiff was examined by Dr. Michael C. Weiss. The Notes of the examination show that the Plaintiff complained of persistent pain in her right shoulder. Examination showed full forward elevation and pain with abduction, adduction and external rotation. An x-ray showed no acute osseous abnormalities and there was no obvious degenerative change at the acromioclavicular joint. (R. 375). The Plaintiff returned to Dr. Weiss on October 31, 1997 with continued pain. Dr. Weiss expressed the opinion

that the Plaintiff had internal derangement of the acromioclavicular joint which would be best treated surgically. The Plaintiff was advise of the option but indicated that she was not ready to undergo any surgical procedures at that time. (R. 374).

The report of an MR performed on September 17, 1999 lists an impression of loss of the cervical lordosis and a very small central herniated nucleus at the C5-6 level. There was no central canal stenosis or neural foraminal encroachment present. (R. 437-438).

Notes from Karen M. Cease, a licensed mental health counselor, include findings of depression and a GAF of 58. (R. 440-449).

Records of visits with Dr. Stanley B. Seidman, Ph.D., were also submitted. (R. 233-247, 289-303, 354-372). These notes reflect continued depression, concerns over her security, pain and anxiety. (R. 233-237, 292-303). A Psychological Report, dated January 17, 1995 and updated on February 28, 1995, found the presence of reactive major depression, somatoform pain disorder and anxiety disorders. (R. 242). The report recommended psychotherapy sessions and classified the Plaintiff as totally disabled. (R. 244).

On May 13, 1996, Dr. Seidman completed a Medical Assessment of Ability to do Work-Related Activities (Mental). (R. 289-291). The assessment found that the Plaintiff had poor or no ability to follow work rules; relate to co-workers; deal with the

public; use judgment; interact with supervisors; deal with work stresses; maintain attention/ concentration; understand, remember and carry out simple, detailed or complex job instructions; maintain personal appearance; behave in an emotionally stable manner and relate predictably in social situations. Dr. Seidman found that the Plaintiff had a fair ability to function independently and demonstrate reliability. (R. 289-290).

In a form dated January 30, 1998, Dr. Seidman found that the Plaintiff's condition met the severity for Listing 12.04. (R. 349-350). Dr. Sedman also completed an assessment form on that date finding that the Plaintiff had poor or no ability to deal with the public; use judgment; interact with supervisors; deal with work stresses; maintain attention/concentration; understand, remember and carry out complex or detailed job instructions; behave in an emotionally stable manner; relate predictably in social situations and demonstrate reliability. The Plaintiff's abilities to relate to co-workers; function independently; understand, remember and carry out simple job instructions and maintain personal appearance were seen as fair. (R. 351-352).

A Psychological Report prepared by Dr. Seidman on April 8, 2002 was also submitted to the ALJ. This report found the presence of depression and anxiety and opined that the Plaintiff would not be able to return to any work duties. (R. 475-476).

Dr. Seidman also completed a Medical Source Statement on April 16, 2002, which found that the

Plaintiff had a substantial loss of ability to make judgments commersurate with the functions of unskilled work. The statement also found that the Plaintiff did not have a substantial loss of ability to understand, remember and carry out simple instruction; respond appropriately to supervision, co-workers and usual work situations and deal with changes in a routine work setting. (R.450). Dr. Seidman also filled out a form which found the presence of an impairment at the level of severity of Listing 12.04. (R.451-452). A Medical Assessment prepared by Dr. Seidman on the same date found that the Plaintiff had poor or no ability in all categories, with the exception of the following in which a "fair" ability was seen: following work rules, functioning independently, and understanding, remembering/carrying out detailed or simple job instructions. The only "good" rating was in the category of maintaining personal appearance. (R.453-455).

The report of an evaluation performed on July 9, 2002 by James R. Milne, D.O., states that the Plaintiff reported pain in her hands, elbow, shoulder and neck. The Plaintiff rated the pain at seven on a scale of ten, but that with medication it was reduced to three. (R.498). The Plaintiff was described as alert, reserved and appearing somewhat depressed. Tenderness to palpation was present on the right and sensory changes were noted. Range of motion of the cervical spine showed thirty degrees of flexion and extension, rotation bilaterally to approximately seventy degrees and side bending bilaterally to approximately thirty degrees. No significant

kyphosis or spinal tenderness to palpation was present in the thoracolumbar spine and the Plaintiff denied any significant low back pain.

The evaluation listed an impression of history of bilateral upper extremity carpal tunnel surgery; probable neuralgia, neuritis or radiculopathy throughout the right upper extremity; evidence of probable neurosensory changes to the left upper extremity hand and elbow regions; history of psychological disorders and history of insomnia. (R.500).

Dr. Milne also completed a medical Assessment of Ability to do Work-Related Activities, which found that the Plaintiff could occasionally lift twenty pounds and occasionally carry up to ten pounds on a sustained basis. (R.502). The assessment also found that sitting, standing and walking were impacted by the impairments. Additionally, the Plaintiff could occasionally use her right and left hands for fine manipulation and frequently use her hands for simple grasping. (R.503). The Plaintiff was able to continuously climb, balance, stoop, crouch and kneel and could occasionally crawl. Dr. Milne also determined that reaching, handling, feeling and pushing/pulling were frequently affected by the impairment and that there were no environmental restrictions. (R.504-505).

On August 2, 2002, the Plaintiff underwent an Adult Personality Evaluation, which was conducted by Paul Jacobs, Ph.D., of Millennium Health Care. (R.506-514). Dr. Jacobs also completed a Medical

Source Statement of Ability to do Work-Related Activities (Mental). (R.515-516). The statement found that the Plaintiff's abilities to understand, remember and carry out instructions and to respond appropriately to supervision, co-workers and work pressure were not affected by her impairment. (R.515-516). The statement also concluded that there were no other capabilities affected by the impairment. (R.516).

Dr. Seidman responded to these findings in a letter dated September 19, 2002, which asserted that the prior evaluation performed on the Plaintiff showed that she met all of the criteria for permanent and total disability. (R.520-521). Dr. Seidman also completed a Medical Statement of Ability do to Work Related Activities (Mental) on September 27, 2002, which found that the Plaintiff had poor or no abilities in all areas listed, with the exception of "fair" abilities in following work rules and understand, remembering and carrying out detailed or simple job instruction. The Plaintiff was found to have a "good" ability to maintain personal appearance. (R.522-523).

On November 26, 2002, the ALJ issued a decision finding that the Plaintiff's impairments of bilateral carpal tunnel syndrome and ulnar entrapment were severe, but did not meet or equal the severity in the listing of impairments. The ALJ also found that the Plaintiff's contentions were not credible since they were not supported by the evidence in the record, including objective medical

According to the ALJ, while the Plaintiff could not perform her prior work as a dental hygienist, as of March 31, 2000, the Plaintiff had the residual functional capacity to perform a full range of sedentary work, and thus, was not disabled. (R.404).

II. LEGAL ANALYSIS

Judicial review of the factual findings in disability cases is limited to determining whether the record contains substantial evidence to support the ALJ's findings and whether the correct legal standards were applied. 42 U.S.C. section 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971); Kelley v. Apfel, 185 F.3d 1211, 1213 (11th Cir. 1999); Martin v. Sullivan, 894 F.2d 1520, 1529 (11th Cir. 1990). "Substantial evidence" is more than a scintilla, but less than a preponderance and is generally defined as such relevant evidence which a reasonable mind would accept as adequate to support a conclusion. Lewis v. Callahan, 125 F.3d 1436, 1440 (11th Cir. 1997).

In determining whether substantial evidence exists, the court must scrutinize the record in its entirety, taking into account evidence favorable as well as unfavorable to the Commissioner's decision. Foote v. Chater; 67 F.3d 1553 F.3d 1553 (11th Cir. 1995); Lamb v. Bowen, 847 F.2d 698, 701 (11th Cir. 1988). The reviewing court must also be satisfied that the decision of the Commissioner correctly applied the appropriate legal standards. See, Bridges v. Bowen, 815 F.2d 622, 624 (11th Cir. 1987). The court may not reweigh evidence or substitute its

judgment for that of the ALJ and even if the evidence preponderates against the Commissioner's decision, the reviewing court must affirm if the decision is supported by substantial evidence. See, Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991); Baker v. Sullivan, 880 F.2d 319, 321 (11th Cir. 1989).

The restrictive standard of review set out above applies only to findings of fact. No presumption of the proper standard to be applied in reviewing claims. Brown v. Sullivan, 921 F.2d 1233, 1236 (11th Cir. 1991); Martin v. Sullivan, 894 F.2d 1520, 1529 (11th Cir. 1990). The failure by the Commissioner to apply the correct law or to provide the reviewing court with sufficient reasoning for determining that the proper legal analysis has been conducted mandates reversal. Cornelius v. Sullivan, 936 F.2d 1143, 1145-1146 (11th Cir. 1991); See also, Wiggins v. Schweiker, 679 F. 2d 1387, 1389 (11th Cir. 1982).

Regulations promulgated by the Commissioner establish a five-step sequential analysis to arrive at a final determination of disability. See, 20 C.F.R. Section 404.1520; 20 C.F.R. section 416.920(a)-(f).

The ALJ must first determine whether the claimant is presently employed. If so, a finding of non-disability is made, and the inquiry ends. 20 C.F.R. section 404.1520(b). In the second step, the ALJ must determine whether the claimant suffers from a severe impairment or combination of

impairments. If such a finding is not made, then a finding of non-disability results, and the inquiry ends. 20 C.F.R. section 404.1520©).

At step three, the ALJ compares the claimant's severe impairments to those in the listing of impairments. 20 C.F.R. section 404.1520(d), subpart P, appendix 1. Certain impairments are so severe, whether considered alone or in conjunction with other impairments, that if such impairments are established, the regulations require a finding of disability without further inquiry into the claimant's ability to perform other work. See, Gibson v. Heckler, 762 F.2d 1516, 1518, n.1 (11th Cir. 1985). If the impairment meets or equals a listed impairment, disability is presumed, and benefits are awarded. 20 C.F.R. section 404. 1520(d).

Step four involves a determination of whether the impairments prevent the claimant from performing his or her past relevant work. If the claimant cannot perform his or her past relevant work, then a prima facie case of disability is established and the burden of going forward with the evidence shifts to the Commissioner to show, at step five, that there is other work available in the national economy which the claimant can perform. 20 C.F.R. section 404. 1520(e)-(f).

The claimant bears the initial burden of proving that she is unable to perform previous work. See, Barnes v. Sullivan, 932 F.2d 1356, 1359 (11th Cir. 1991). The inability to perform previous work

relates to the type of work performed, not to merely a specific prior job. See, Jackson v. Bowen, 801 F. 2d 1291, 1293 (11th Cir. 1986).

In the present case, the ALJ found, at step five, that while the Plaintiff could not perform her past relevant work, she retained the residual functional capacity to perform the full range of sedentary work, and thus, was not disabled. The Plaintiff contends that ALJ erred by failing to find that the Plaintiff's depression was a severe impairment, by failing to consider evidence after the date last insured and by improper interpretation of the remand by Chief Judge Zloch.

The resolution of this case focuses on the weight give to the finding by Dr. Seidman since his assessments form the basis for the Plaintiff's contention that the depression was severe, and in fact disabling.

The opinion of a treating physician is entitled to substantial weight unless good cause exists for not heeding the treating physician's diagnosis. Lewis v. Callahan, 125 F.3d 1436, 1440 (11th Cir. 1997). Good cause has been see when the treating doctor's opinion was not bolstered by the evidence; the evidence supported a contrary finding or the opinion was conclusory or inconsistent with the physician's own medical records. If the ALJ disregards the opinion of the treating physician, the ALJ must clearly articulate his reasons. See Phillips v. Barnhart, 357 F.3d 1232, 1240-1241 (11th Cir. 2004).

In the decision issued on March 13, 1998, the ALJ discussed the findings by Dr. Seidman and ultimately concluded that the Plaintiff did not suffer from a severe psychological impairment. In making this determination, the ALJ cited to the following: the findings by the state consultants; the objective evidence, which showed no problems with maintaining personal appearance; inconsistencies in the doctor's treating notes; the lack of evidence to show that the Plaintiff had difficulty interacting with the doctor as well as the ALJ's own observations; the claimant's daily activities; inconsistencies in the assessment without showing any basis for the changes; the lack of any objective evidence of an appetite disturbance as found by Dr. Seidman and the lack of any evidence of suicidal thoughts. (R.24-26). Based on this review, the ALJ determined that the Plaintiff's reactive depression had only "slight" restrictions on her activities of daily living.

The ALJ also noted the tasks the Plaintiff performed, including attending college. (R.26-27).

In the decision issued on November 26,2002, following the remand order by Chief Judge Zloch, the ALJ recounted the findings by Magistrate Judge Seltzer, which in essence simply reflected the earlier findings made by the ALJ. The decision also discussed the medical evidence produced following

remand which related to the time period following the date the Plaintiff was last insured (R.400-401). The ALJ also noted the Plaintiff's testimony that she had applied for different jobs, but had not been hired and that she had attended college. (R.402).

This Court finds that the ALJ correctly found that the opinions of disability and severe impairment found by Dr. Seidman were not supported by the evidence, as set out above, including the Plaintiff's own activities, which fail to show that the Plaintiff is as incapacitated as asserted. Accordingly, there no basis for error.

The Plaintiff also contends that error occurred by the ALJ failing to consider the evidence concerning the Plaintiff's treatment after the date last insured of March 31, 2000. However, this Court agrees with the Defendant that no error can be seen in failing to consider the evaluations. In the present case, a disability had to be present before March 31, 2000. The examinations conducted in 2002 do not reflect the Plaintiff's condition two years earlier, and in any event, the findings by Dr. Seidman were the same as those previously reviewed, and properly rejected by the ALJ. Thus, no error is present.

The final argument raised by the Plaintiff relates to the ALJ's endorsement of the Report and Recommendation by Magistrate Judge Seltzer. According to the Plaintiff, the adoption of the findings made in the Report and Recommendation improperly circumvent the remand order entered by Chief Judge Zloch.

A review of the decision by the ALJ shows that the findings made by Magistrate Judge Seltzer were the same as those in the 1998 decision by the ALJ. As such, the ALJ simply adopted those prior findings in making the determination that the Plaintiff did not have a severe mental impairment. The ability to make this finding was not precluded by the remand order from Chief Judge Zloch which required further medical examination and evidence, which, if it related to the applicable disability period, would have been properly considered by the ALJ. Since the evidence following remand did not impact on that period, no error can be seen in the ALJ repeating this prior determination. The decision by the ALJ was supported by substantial evidence, and thus, there is no basis for either remand or the reward of benefits.

III. CONCLUSION

Based on the foregoing, the Court finds that the decision issued by the ALJ is supported by substantial evidence and the correct legal standards were applied. Accordingly, it is ORDERED AND ADJUDGED as follows:

(1) The Motion for Summary Judgment filed by the Plaintiff (D.E. #8) is DENIED.

(2) The Motion for Summary Judgment filed by the Defendant (D.E. #17) is GRANTED.

(3) Any pending motions are deemed MOOT and this is hereby CLOSED.

DONE AND ORDERED this 13th day of December 2006.

_____

ROBERT L. DUBE
UNITED STATES MAGISTRATE JUDGE.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 00-6044-CIV-ZLOCH

GLORIA PERSICHILLI,

Plaintiff,

vs.

KENNETH S. APFEL, Commissioner of Social Security

Defendant.
_____/

FINAL ORDER OF REMAND

THIS MATTER is before the Court upon the Report And Recommendation To The District Judge (DE 28), filed herein by United States Magistrate Judge Barry S. Seltzer and upon the Plaintiff, Gloria Persichilli's Objections To The United States Magistrate Judge's Report And Recommendation (DE 31). The Court has conducted a de novo review of the entire record herein and after due consideration, it is **ORDERED AND ADJUDGED** as follows:

1.The Court declines to affirm The Report And Recommendation To The District Judge (DE 28), filed herein by United States Magistrate Judge Barry S. Seltzer;

2. The above-styled cause be and the same is hereby Remanded to the Commissioner of Social Security to order a consultative medical examination and to receive expert medical evidence as to the nature and severity of the Plaintiff., Gloria Perschilli's current impairment and as to its effect on her ability to function in a work setting; and

3. To the extent not otherwise disposed of herein, all pending motions are hereby **DENIED** as moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 22nd day of December, 2000.

WILLIAM J. ZLOCH
Chief United States District Judge

Copies furnished:

The Honorable Barry S. Seltzer
United States Magistrate Judge

Sarah H. Bohr, Esq.
For Plaintiff

Jeffery R. Levenson, Esq. AUSA
For Defendant

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 00-6044-Civ-Zloch/Seltzer

GLORIA PERSICHILLI,

Plaintiff,

vs.

Kennether Apfel
Commissioner of Social Security,

Defendant.
_____/

PLAINTIFF'S OBJECTIONS TO THE UNITED STATES MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

ARGUMENT

III.

C. **Dr. Ouellette's opinion that Listing 1.13 was met or equaled is not inconsistent with her later opinion that Ms. Persichilli can perform a limited range of sedentary work, as found by the ALJ.**

The Magistrate Judge also cited to a purported inconsistency between Dr. Ouellette's earlier statements regarding disability and her

"later statement that (Ms. Persichilli) could perform sedentary work" R&R at 19. However, contrary to the impression in the R&R, Dr Ouellette never opined that Ms. Persichilli can perform the full rangeof sedentary work. See R&R at 5,19. Rather, Dr. Ouellette limited Ms. Persichilli to the performance of sedentary work which did not require repetitive hand movements. (Tr. 338).

As argued in Plaintiff's Memorandum, there is certainly no dispute that the use of one's hands is essential to the performance of sedentary work. See Plaintiff's Memorandum at 14-15. Furthermore, most unskilled sedentary jobs entail the good use of both hands. Id. Since the inability to use hands for repetitive functions substantially limits the full range of sedentary work. Dr. Ouellette's opinions regarding her patient's functioning are actually consistent.

In any event, the Magistrate Judge has ignored the fact that at issue in this case is Ms. Persichilli's entitlement to benefits from her alleged onset date of December 20, 1994 and continuing. (Tr. 113). Dr. Ouellette opined that Ms. Persichilli's bilateral carpal tunnel syndrome met or equaled Listing 1.13 on March 27, 1996, fifteen months after this date. Dr. Ouellette did not opine that Ms. Persichilli can perform limited range of sedentary work until December 12, 1997, which is three years after her alleged onset date of December 20, 1994. At a minimum, Ms. Persichilli may well be entitled to a closed period of disability.

In sum. The Magistrate Judge's interpretation of Listing 1.13 is not supported either by the plain language of this listing or by the case law construing this listing and should not be affirmed. Furthermore, even accepting that Listing 1.13 may not be precisely met in this case. Dr. Ouellette specifically opined that Listing 1.13 was equaled. Accordingly, this Court should not adopt the Magistrate Judge's findings in this case that Listing 1.13 was not met or equaled.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 00-6044-Civ-Zloch/Seltzer

GLORIA PERSICHILLI,

Plaintiff,

vs.

Kennether Apfel
Commissioner of Social Security,

Defendant.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANT'S PETITION FOR SUMMARY JUDGMENT

ARGUMENT

III. THE COMMISSIONER FAILED TO SUSTAIN HIS BURDEN OF ESTABLISHING THAT MS. PERSICHILLI HAS THE RESIDUAL FUNCTIONAL CAPACITY TO PERFORM LIGHT WORK.

In this case, the ALJ found that Ms. Persichilli can perform "light work" except for using her hands in repetitive tasks. (Tr. 32,34). He then used this finding in forming the hypothetical questions to the vocational expert, which he then relied on in denying this claim. (Tr. 33-35).

Yet, as set forth in Plaintiff's Memorandum, and ignored by the Commissioner in his Memorandum, the burden was on the Commissioner to demonstrate that the "claimant possesses the residual functional capacity to perform jobs that exist in the national economy." Cruze v. Chater, 85 F.3d 1320, 1322 (8th Cir. 1996). See Plaintiff's Memorandum at 17, fn. 8. Indeed, the Eighth Circuit recently reiterated this fact in Singh v. Apfel, No. 99-2366, 2000 WL 1191031, (8th Cir. Aug. 21, 2000) holding that the Commissioner's burden is two-fold: "first, that the claimant retains the residual functional capacity to perform other kinds of work, and, second, that other such work exists in substantial numbers in the national economy." Id., citing Nevland v. Apfel, 204 F. 3d 853, 857 (8th Cir. 2000). In this case, the record is void of any medical evidence which supports the ALJ's light work finding.

Even assuming that the ALJ properly rejected the opinion of Dr. Ouellette that Ms. Persichilli's carpal tunnel syndrome met the requirements of Listing 1.13, his findings, at the very most, would support that Ms. Persichilli can perform a limited range of sedentary work which did not require repetitive hand movements. (Tr. 338). There is absolutely no support anywhere in Dr. Ouellette's records, or anywhere else in this record for that matter, for the ALJ's light work finding. As such, the Commissioner failed to sustain his burden of establishing that there is other work in the national economy that Ms. Persichilli can perform.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 00-6044-Civ-Zloch/Seltzer

GLORIA PERSICHILLI,

Plaintiff,

vs.

Kennether Apfel
Commissioner of Social Security,

Defendant.
_____/

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

II. THE COMMISSIONER FAILED TO ACCORD PROPER WEIGHT TO THE OPINIONS OF MS. PERSICHILLI'S TREATING ORTHOPEDIC SURGEON, DR. OUELLETTE.

In his decision, the ALJ attempted to discredit the findings of Dr. Ouellette, Ms.Persichilli's long-term orthopedic surgeon, who has treated her carpal tunnel syndrome. (Tr. 227-232,266-287).

Significantly, Dr. Ouellette is a specialist and is the Chief of the Hand Surgery Service at the University of Miami School of Medicine. (Tr. 273). As a specialist, her opinion is entitled to additional

weight. See 20 C.F.R.§ 404.1527(d)(5) (recognizing that more weight should be accorded to the opinion of a specialist). Yet, the ALJ, without citation to any contrary evidence, found that the opinion of Dr. Ouellette was "unsupported by, and inconsistent with, objective medical evidence." (Tr.31). The ALJ simply failed to provide the requisite good cause for rejecting Dr. Ouellette's opinion.

As found by the ALJ, Ms. Persichilli suffers from severe bilateral carpal syndrome and ulnar entrapment, impairments which affect Ms. Perscihilli's ability to use her hands for repetitive movements. (Tr. 34). There is certainly no dispute that the use of one's hands is essential to the performance of sedentary and light work. As the Commissioner's own policies state, "(m)ost unskilled sedentary jobs require good use of the hands and fingers for repetitive hand-finger actions." Social Security Ruling 96-9p. Further, "(a)ny significant manipulative limitation of an individual's ability to handle and work with small objects with both hands will result in a significant erosion of the unskilled sedentary occupational base." Id. While light work requires "use of arms and hands to grasp and to hold and turn objects," it generally does "not require use of the fingers to fine activities to the extent required in much sedentary work." Id. Consistent with these policies, the Eleventh Circuit specifically recognized that the "Inability to perform jobs requiring bilateral manual dexterity significantly compromises' the range of sedentary work a claimant can perform." Foote v. Chater, 67 F.3d 1552, 1560 (11th Cir. 1995),

citing 20 C.F.R. Part 404, Subpt. P, App 2 § 201.00(h). Furthermore, most unskilled sedentary jobs entail the good use of both hands. Id.

A. The ALJ erred in rejecting Dr. Ouellette's opinion that Ms. Persichilli's carpal tunnel syndrome met or equaled Listing 1.13. On March 27, 1996, Dr. Ouellette specifically opined that Ms. Persichilli's carpal tunnel syndrome met or equaled the requirements of Listing 1.13 (Tr. 266). At that point, Ms. Persichilli had underwent three carpal tunnel releases, on May 27, 1994 on the right hand; on January 27, 1995 again on the right hand; and on December 19, 1995, on the left hand. (Tr. 206-209, 229-230,268-271). Listing 1.13 is met if the evidence establishes; soft tissue injuries of an upper or lower extremity requiring a series of staged surgical procedures within twelve months after onset for salvage and/or restoration of major function of the extremity, and such major function was not restored or expected to be restored within 12 months after onset.

In this case, the ALJ did not accord any weight to Dr. Ouellette's opinion because (1) the physician failed to clarify whether Ms. Persichilli's impairment met or equaled a listing; (2) "the medical evidence does not support that the claimant satisfied the requirement of being 'staged surgical procedures'" and (3) this opinion conflicted with Dr. Ouellette's later opinion, dated almost two years later on December 12, 1997, that "the claimant was capable of performing sedentary work." (Tr. 23).

These reasons simply do not constitute good causes to reject the uncontradicted opinion of Dr. Ouellette, whose opinion is entitled to substantial weight. See Lewis v. Callahan, 125 F.3d at 1440; Venette v Apfel, 14 F. Supp.2d at 1312.

First, it is irrelevant whether the impairment met or equaled a listing, as a claimant is disabled in both circumstances without further consideration of vocational factors. See 20C.F.R. §404.1520(d). Furthermore, to the extent the ALJ required more information, he had a duty to recontact Dr. Ouellette for clarification. See 20 C.F.R § 404.1519n.

Second, the ALJ's construction of Listing 1.13 is not supported by the plain language of this listing. The ALJ specifically stated that the "regulations are clear that these future (staged surgical) procedures must be clearly and definitely established at the inception of the first surgical procedure." (Tr. 23). Yet this listing, set forth above, fails to include any such statement. The only other discussion of Listing 1.13 is in the preamble to the listing, which states;

C. After maximum benefit from surgical therapy has been achieved in situations involving fractures of an upper extremity (see 1.12) or soft tissue injuries of a lower or upper extremity (see 1.13), i.e., there have been no significant changes in physical findings or x-ray findings for any 6-month period after the last definitive surgical procedure, evaluation should be made on the basis of demonstrable residuals.Listing 1.00(C). Thus,

there is absolutely no requirement, as found by the ALJ, that the subsequent surgeries must be anticipated when the first surgery occurs.

Third, the fact that over a year and a half later, Dr. Ouellette opined that Ms. Persichilli could perform a limited range of sedentary work cannot serve as a basis to discredit her March 1996 assessment. At issue in this case is Ms. Persichilli's entitlement to benefits from her alleged onset date of December 20, 1994, based on her application filed on March 13, 1995. (Tr. 113). Thus, to the extent her carpal tunnel syndrome may have improved somewhat does not negate the earlier opinion, rendered over a year after her application for benefits, that her condition met or equaled Listing 1.13. Furthermore, Dr. Ouellette's subsequent opinion dated December 12, 1997 that Ms. Persichilli can perform sedentary work is not unequivocal, but rather is limited by the fact that she can only perform work which does not require repetitive functions. (Tr. 338).

As set forth above, the inability to use hands for repetitive functions substantially limits the full range of sedentary work. Thus, Dr. Ouellette's opinions regarding her patient's functioning are actually consistent.

B. The ALJ erred in rejecting Dr. Ouellete's opinion that Ms. Persichilli can perform only a limited range of sedentary work. Not surprisingly, the ALJ also rejected Dr. Ouellette's opinion that Ms. Persichilli is limited to the performance of a

reduced range of sedentary work, as "it is unsupported by, and inconsistent with, objective medical evidence." (Tr. 31). In support of this finding, the ALJ cited to the other evidence which documents that Ms. Persichilli is only restricted from repetitively using her hands. (Tr. 31). Yet, given the fact that the Commissioner's own policies provide that sedentary work requires the repetitive use of the hands, the evidence of record is all consistent with Dr. Ouellette's findings rather than inconsistent.[8]

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[8] The ALJ's statement that "there is nothing in Dr. Oullette's treatment notes to indicate that the claimant would be incapable of performing light work" improperly placed the burden of proof on the claimant, when the burden to establish Ms. Persichilli's residual functional capacity was on the Commissioner. (Tr. 31). However, Ms. Persichilli's burden was only to establish her inability to perform her past relevant work as a dental hygienist, which was met in this case. (Tr. 34). See Welch v. Bowen, 854 F.2d 436, 438 (11th Cir. 1988). Thus, the burden was on the Commissioner, not Ms. Persichili, to establish that she was capable, considering her age, education, and past work experience, of engaging in other work. Id. The Commissioner must demonstrate that the "claimant possesses the residual functional capacity to perform jobs that exist in the national economy." Cruze v. Chater, 85 F.3d 1320, 1322 (8th Cir. 1996). This burden includes the duty to establish by medical evidence that the claimant has the

In sum. It is apparent that the ALJ again improperly substituted his own opinion for those of Dr. Ouellette, and failed to provide specific substantiated reasons for discrediting her opinion. As this opinion was uncontradicted by any examining medical provider, it should have been accorded substantial weight. See Venette v. Apfel, 14F. Supp. 2d at 1312. Accordingly, the opinion of Dr. Ouellette should be accepted as true as a matter of law. MacCregor v. Bowen, 786 F2d 1050, 1053 (11th Cir. 1986). Based on the foregoing, Ms. Persichilli requests that this Court reverse the determination of the ALJ that she is disabled and award benefits forthwith.

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requisite RFC. Davis v. Callahan, 985 F. Supp. 907, 909 (S.D. Iowa 1997), citing McCoy v. Schweiker, 683 F.2d 1138, 1147 (8th Cir. 1982). Here there is simply no medical evidence from any examining medical provider which supports the ALJ's finding that Ms. Persichilli can perform light work.